NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NATALIA BRUTON, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

GERBER PRODUCTS COMPANY,

Defendant-Appellee.

No. 15-15174

D.C. No. 5:12-cv-02412-LHK

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Lucy H. Koh, District Judge, Presiding

Argued December 13, 2016 Submitted April 19, 2017
San Francisco, California

Before: O'SCANNLAIN, GOULD, and M. SMITH, Circuit Judges.

Plaintiff-Appellant Natalia Bruton filed a putative class action against baby food manufacturer Gerber Products Company (Gerber). Bruton alleged that labels on certain Gerber baby food products included claims about nutrient and sugar content that were impermissible under Food and Drug Administration (FDA)

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

regulations incorporated into California law. The district court dismissed several of Bruton's claims, denied class certification, denied partial summary judgment for Bruton, and granted summary judgment to Gerber. Bruton appeals, challenging the district court's orders. We have jurisdiction under 28 U.S.C. §§ 1291 and 1332(d). We reverse and remand.

1. The district court erred in dismissing Bruton's claim for unjust enrichment/quasi-contract. At the time when the district court dismissed this claim, California's case law on whether unjust enrichment could be sustained as a standalone cause of action was uncertain and inconsistent. But since then, the California Supreme Court has clarified California law, allowing an independent claim for unjust enrichment to proceed in an insurance dispute. *See Hartford Cas. Ins. Co. v. J.R. Mktg., L.L.C.*, 61 Cal. 4th 988, 1000 (2015); *see also Ghirardo v. Antonioli*, 14 Cal. 4th 39, 54 (1996) (recognizing independent cause of action for unjust enrichment relating to real estate transaction). In light of this clarification, we reverse the district court's dismissal and remand for consideration of whether there are other grounds on which Bruton has failed to state a claim for unjust enrichment, or if that claim must proceed to resolution.

2. The district court erred when it held that the class could not be certified because it was not "ascertainable." Again, the district court's reasoning runs headlong into an inconsistent case that was decided after the district court's ruling. In *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), our court—using different terminology for what the district court called "ascertainability"—held that there was no separate "administrative feasibility" requirement for class certification. *Id.* at 1123. We reverse the district court's denial of class certification and remand for further consideration of whether class certification is appropriate.

3. The district court erred in holding that there was no genuine dispute of material fact on Bruton's claims that the labels were deceptive in violation of California's Unfair Competition Law (UCL), *see* Cal. Bus. and Prof. Code § 17200, False Advertising Law (FAL), *see id.* § 17500, and Consumer Legal Remedies Act (CLRA), *see* Cal. Civ. Code § 1770.

Bruton's theory of deception does not rely on proving that any of Gerber's labels were false. Rather, Bruton contends that the combination of (a) the presence of the claims on Gerber's products (in violation of FDA regulations), and (b) the lack of claims on competitors' products (in compliance with FDA regulations), made Gerber's labeling likely to mislead the public into believing that Gerber's products were of a higher quality than its competitors' products.

Doubtless, Bruton's theory of deception is unusual. But even technically correct labels can be misleading. *See Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 510 (2003) ("The advertisement, although literally true, was nevertheless deceptive and misleading in its implications." (quoting *People v. Wahl*, 39 Cal. App. 2d Supp. 771, 773 (Cal. App. Dep't Super. Ct. 1940) (literally true advertisement was misleading because price of offered product was 50% off regular price of more expensive product, not regular price of the offered product)); *see also Leoni v. State Bar*, 39 Cal. 3d 609, 627 (1985) (holding that attorney advertising, though not false, was misleading because "[a] necessary fact ha[d] been omitted."). Here, it may be literally true that Gerber's products are "As Healthy As Fresh," but due to external facts—that Gerber does not comply with the FDA regulations that otherwise prevent its competitors from making the same claim—Gerber's labels mislead in their implications.

Bruton's theory of deception comports with common sense. Shoppers in a supermarket aisle look for cues about quality in the products they buy. If a shopper sees two products on a shelf and one says "Supports Healthy Growth & Development," while the other makes no similar claim and is cheaper, a likely inference is that the first product will be viewed as healthier, explaining why it costs more. If the products had been of the same quality, then competitive pressures would have driven the maker of the second product to use the same attractive label. In the baby food market in particular—where measuring the effect of a particular food on one's own baby's growth and development is not practical—consumers have to make quality judgments before the baby is fed, based on what they see in front of them at the store. When everyone plays by the rules, this process works reasonably well. But when the maker of one product complies with a ban on attractive label claims, and its competitor does not do so, the normal assumptions no longer hold, and consumers will possibly be left deceived. We hold that Bruton has alleged a viable claim for consumer deception.[1]

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[1] That Bruton reviewed the nutritional information of both Gerber's and its competitors' products does not undermine the deceptive nature of Gerber's labels. Consumers cannot easily check claims like "Supports Healthy Growth & Development," or "As Healthy As Fresh," against nutritional charts to determine their veracity. Consumers might believe, for instance, that the claims refer to the quality of the produce used or the particular canning process. The same holds for the absence of such claims. Does the lack of the claim "Supports Healthy Growth & Development" on a competitor's product mean that the product does not support healthy growth and development? A nutritional chart does not answer that question. This problem applies even for seemingly black and white claims like "No Added Sugar." If Gerber's product says "No Added Sugar," and a competitor's product does not, the competitor's nutritional chart will not under current FDA requirements tell the consumer whether any of the sugar in its product was added—it will simply list the amount of "Sugars." *See* Food Labeling: Revision of the Nutrition and Supplement Facts Labels, 81 Fed. Reg. 33742-01, 33742 (May 27, 2016) (codified at 21 C.F.R. pt. 101) (compliance date for new "Added Sugar" rule delayed until 2018 or 2019). Nevertheless, the reasonable assumption would be that some of the sugar in that competitor's product must have

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The next questions is whether Bruton submitted enough evidence of likely consumer deception to create a genuine dispute of material fact for trial. Bruton submitted the following evidence to support consumer deception: (1) Gerber's and its competitors' labels; (2) Bruton's own testimony about being misled by Gerber's labels; and (3) two warnings letters from the FDA.

The key evidence is the labels. A reasonable jury observing Gerber's labels and comparing them to those of its competitors could rationally conclude that Gerber's labels were likely to deceive members of the public. *See Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663, 679 (2006) ("In determining whether a statement is misleading under the [FAL], the primary evidence . . . is the advertising itself." (internal quotation marks omitted)); *see also id.* ("The misleading character of a given representation appears on applying its words to the facts." (internal quotation marks omitted)).[2] We hold that Bruton has submitted sufficient evidence to create a genuine dispute of material fact over the reasonable

[1](...continued)
been added, or else the competitor would have used the attractive label "No Added Sugar." The upshot is that nutritional charts on Gerber's and its competitors' products do not cure what makes Gerber's packaging misleading—that the reason for Gerber's claims is not superior products, but a disregard for industry regulation.

[2] The advertisement in *Colgan*, unlike Gerber's labels, was actually false. *Id.* at 682–83. However, we cite *Colgan* not as support for Bruton's theory of deception, but as support for the high evidentiary value of the labels in this case.

consumer test. We reverse the district court's grant of summary judgment to Gerber on Bruton's claims that the labels were deceptive in violation of the UCL, FAL, and CLRA.

4. The district court erred in granting summary judgment to Gerber on Bruton's claims that the labels were unlawful under the UCL. The UCL's unlawful prong "borrows" predicate legal violations and treats them as independently actionable under the UCL. *Wang v. Massey Chevrolet*, 97 Cal. App. 4th 856, 871 (2002). The best reading of California precedent is that the reasonable consumer test is a requirement under the UCL's unlawful prong only when it is an element of the predicate violation. *Compare, e.g.*, *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th 1351, 1354, 1360 (2003) (holding that UCL claims were subject to the reasonable consumer test where the predicate violations were of the FAL and CLRA, both of which require meeting the reasonable consumer test); *with Los Angeles Mem'l Coliseum Comm'n v. Insomniac, Inc.*, 233 Cal. App. 4th 803, 835 (2015) (holding that a UCL claim was properly stated—without mention of the reasonable consumer test—where the predicate violation was of federal tax law). The predicate violation here is of California's Sherman Law, *see* Cal. Health & Safety Code §§ 110760, 110765, which itself incorporates standards set by FDA regulations, *see id.* §§ 110100, 110670. These FDA regulations include no requirement that the public be likely to experience deception. *See* 21 C.F.R. §§ 101.13(b)(3), 101.60(c)(2)(v). We reverse the district court's grant of summary judgment to Gerber on Bruton's claims that the labels were unlawful in violation of the UCL.

REVERSED and **REMANDED**